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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRVING L. GARTENBERG,

Petitioner,

—vs.—

HONORABLE MILTON POLLACK, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (MERRILL LYNCH ASSET MANAGEMENT, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and MERRILL LYNCH READY ASSETS TRUST, real parties in interest),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Are the parties to a private action for damages under § 36(b) of the Investment Company Act of 1940 entitled to a jury trial pursuant to the Seventh Amendment to the Constitution?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Second Circuit, *In re Gartenberg,* No. 80-3034 (1a) is not reported. The opinion of the District Court (7a) is reported at 487 F. Supp. 999 (1980).

JURISDICTION

The decision of the Second Circuit was dated and filed October 9, 1980. A timely petition for rehearing in banc was denied November 20, 1980. (24a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

Due to its length, § 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-35(b), is set forth in the appendix at 31a.

STATEMENT OF THE CASE

Petitioner is a shareholder of defendant Merrill Lynch Ready Assets Trust (the "Trust"), an open-end investment company or mutual fund registered under the Investment Company Act of 1940. He has brought the action derivatively on behalf of the Trust against its investment adviser (the "Adviser") and the parent company of the Adviser.*

The action is brought under § 36(b) of the Investment Company Act. In short, § 36(b) provides that the investment adviser of a registered investment company owes it a fiduciary duty with respect to the compensation which the company pays the adviser. For breach of that fiduciary duty, the SEC, or a security holder on behalf of the investment company, may bring suit against the adviser.

Section 36(b)(3) provides for an action to recover "the actual damages resulting from the breach of fiduciary duty . . . ."

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* *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 79 Civ. 3123 (MP) (SDNY). Jurisdiction of the District Court was invoked under §§ 36(b) and 44 of the Act, 15 U.S.C. §§ 80a-35(b) and 43 respectively.

The amended complaint asserts just such a claim for damages. The complaint charges that the Adviser is receiving fees from the Trust at the rate of over $30,000,000 per year (Compl. ¶¶ 9-9(a); 26a) against expenses which were negligible (Compl. ¶ 15; 28a). Although the purpose of the Trust is to maximize current income, the fee was so large, that for the year ended December 31, 1978, it consumed 5.75% of the Trust's investment income (Compl. ¶ 16; 28a). It is alleged that the Adviser violated § 36(b) by charging fees which were "exorbitant, unreasonable, excessive and completely disproportionate to the services rendered." (Compl. ¶ 17; 28a). Judgment is requested requiring the Adviser to pay to the Trust the excessive portion of the advisory fee.

Petitioner made a timely demand for a trial by jury. Defendants' motion to strike this demand was granted by Judge Pollack in a decision reported at 487 F. Supp. 999 (SDNY 1980) and petitioner's motion for certification of this order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) was denied.

Petitioner next applied to the Court of Appeals for the Second Circuit for a writ of mandamus directing Judge Pollack to grant petitioner a jury trial. This petition was denied on October 9, 1980 per Judges Van Graafeiland, Newman and Neaher (USDJ of the Eastern District of New York, sitting by designation) (rehearing in banc denied November 20, 1980).

The court recognized that petitioner's action for excessive fees was the very type of action contemplated by § 36(b). Although the court recognized that an action for damages may be brought under § 36(b), it held that petitioner was not entitled to a jury trial because he failed to allege damages.

> "The remedial 1970 amendment of [Section 36] added a subsection (b) which explicitly granted the private right of action to recover unreasonable compensation paid by a fund to its adviser." *Tannenbaum v. Zeller,* 552 F.2d 402, 417 (2d Cir.), *cert. denied,* 434 U.S. 934 (1977). This is the

relief which petitioner seeks. He alleges no damage and seeks no damages. He is not entitled to a jury trial.

In re Gartenberg, Slip Op. at 52, 54-55; 5a-6a.

REASONS FOR GRANTING THE WRIT

A. The decision below is certain to have wide-ranging impact on numerous similar cases which are pending

The decision below is the first appellate ruling on the right to a jury trial in actions under § 36(b) since that section became effective in 1972.

The holding deprives petitioner of his important constitutional right to trial by jury. Moreover, the ruling will have the effect of denying a jury trial in a substantial number of similar cases. Petitioner is aware of 11 similar cases, 10 of which are pending in the Second Circuit. Motions to strike the jury demand have already been made in at least five of them.*

Unless certiorari is granted here, the cases pending in the districts covered by the Second Circuit will proceed, as the present case must, over the objection of plaintiffs to lengthy trials without juries. If this Court ultimately determines that there is a right to a jury trial in such actions, parties in these cases in the Second Circuit will have been deprived of jury trials. At best all those cases may have to be retried, thus adding to the congestion of an already badly congested calen-

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* E.g., motions to strike the jury demand were made in: *Markowitz v. Moneymart Assets, Inc.,* 80 Civ. 2233 (RLC) (SDNY); *Blatt v. Dean Witter Reynolds Intercapital, Inc.,* 79 Civ. 5489 (MEL) (SDNY); *Levy v. Bernstein-Macauley, Inc.,* 80 Civ. 2657 (RJW) (SDNY); *Landy v. Paine Webber Cash Fund,* B-80-260 (D. Conn.); *Weiss v. Temporary Investment Fund, Inc.,* Civ. No. 80-230 (D. Del.); a jury was demanded in: *Kriendler & Kriendler v. Fidelity Management and Reserve Co.,* 80 Civ. 5210 (DBB) (SDNY); *Schuyt v. Rowe Price Prime Reserve,* 80 Civ. 506 (SDNY); *Meyer v. Oppenheimer Management Corp.,* 80 Civ. 0397 (SDNY); *Lewis v. Oppenheimer,* 80 Civ. 1465 (EDNY); *Jerozal v. Cash Reserve Management,* B-80-343 (D. Conn.); *Rosenfeld v. Merrill Lynch,* 80 Civ. 6122 (SDNY).

dar. Similar problems will arise in the other circuits around the country which may, unless guided by the decision of this Court, choose to follow the rule of the Second Circuit. The grant of certiorari here is the only way to prevent a staggering waste of judicial time and litigants' money.

B. The deprivation of petitioner's constitutional right to a jury trial involves a question of exceptional importance

This Court has long recognized that the right to trial by jury is a basic and fundamental element of federal jurisprudence. *Simler v. Conner,* 372 U.S. 221, 222 (1963); *Bailey v. Central Vermont R. Co.,* 319 U.S. 350, 354 (1943). Any seeming curtailment of this right "should be scrutinized with the utmost care." *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501 (1959); *Dimick v. Scheidt,* 293 U.S. 474, 486 (1935). To this end, this Court has declared that it is the "responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." *Dairy Queen v. Wood,* 369 U.S. 469, 472 (1962). Thus, in both *Beacon Theatres* and *Dairy Queen* the District Court had overruled the jury demand; in both, the Court of Appeals refused to grant mandamus; in both, this Court reversed: "The Court of Appeals should have corrected the error of the District Judge by granting the petition for mandamus." *Dairy Queen, supra,* 369 U.S. at 480.

The need for prompt review of the decision below is well stated in *In re Simons,* 247 U.S. 231 (1918). There, the District Court had transferred the first count of a two-count complaint to the equity side. This Court, per Holmes, J., granted mandamus because the order below

> deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.

Id. at 239. This consideration is multiplied where, as here, there are numerous similar cases wherein other plaintiffs and other courts will also be put to difficulty and inconvenience.

C. The Court of Appeals' decision conflicts with an applicable decision of this Court

The decision below acknowledges that an action for damages may be brought under § 36(b). 3a. The Court of Appeals held, however, that petitioner was not entitled to a jury trial because: "He alleges no damage and seeks no damages. 6a."

Although the word "damages" does not appear in the complaint, the clear intendment of the pleadings is that the Trust has been damaged by being caused to pay excessive fees to its investment adviser. As this Court held in *Dairy Queen v. Wood,* 369 U.S. 469, 477-79 (1962), "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings" (pp. 477-78).

Dairy Queen v. Wood, supra, is analogous to this case. The action there was for breach of contract and trademark infringement, but the complaint prayed for an accounting. The Supreme Court, nevertheless, sustained the right to trial by jury. It held that the action was at law since it was essentially one for damages; and that an accounting was unnecessary since the legal remedy was adequate (pp. 478-79).

Further, Rule 54(c) F.R.Civ.P. provides:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

This provision directs that the plaintiff, if successful, be granted the relief to which he is entitled, not the relief he requests. Section 36(b) entitles the plaintiff to damages. The prayer for relief is, therefore, irrelevant.

Moreover, although the complaint asks that defendants "account to the Trust," this is merely a prayer that the proper measure of damages be paid, not to petitioner, but to the Trust for whose benefit this action is brought.

D. Petitioner's action is one for damages by the express terms of § 36(b); it is, therefore, an action at law and triable by jury

The Seventh Amendment to the Constitution provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." The Amendment "does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law"; *Curtis v. Loether,* 415 U.S. 189, 194 (1974). In a stockholder's derivative action, such as that at bar, the parties are constitutionally entitled to a jury if the claim of the corporation, which the stockholder asserts on its behalf, is legal rather than equitable. *Ross v. Bernhard,* 396 U.S. 531 (1970).

This Court has instructed on many occasions that "the starting point of every case involving construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976). *Accord, Transamerica Mortgage Advisers v. Lewis,* 444 U.S. 11, 16 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979); *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 472 (1977). Accordingly, we begin with the language of § 36(b).

Subdivision (b)(3) of § 36 provides:

> No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no *damages* or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of *damages* shall be recoverable for any period prior to one year before the action was instituted. Any award of *damages*

> against such recipient shall be limited to the *actual damages* resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient." (Emphasis added)

Not less than four times does the statute describe an action to recover excessive fees as one for "damages." Only "actual damages resulting from the breach of fiduciary duty" are recoverable. Plainly, a company that pays more for its adviser's services than they are worth suffers damages, and the damages result from the adviser's demanding or accepting the excessive payment in breach of its fiduciary duty.

The construction of § 36(b) adopted by the court below would produce incongruous results, plainly frustrating the intent of Congress. Section 36(b) contains express restrictions upon an action for *damages.* It imposes a one year statute of limitations and places a ceiling on the amount of the recovery. § 36(b)(3). Under the decision below, since petitioner "seeks no damages" (Op. at 55; 6a), he would not be restricted by these limitations—instead, he could rely upon the general equity statute of limitations (which in New York is six years, CPLR § 213) and he could seek recovery in excess of both the amount received by the Adviser and the actual damage to the Trust. Obviously, Congress could not have intended such a result. The limitations of § 36(b)(3) must apply to the primary action envisioned by the statute, an action such as the present, an action for damages.

An action for damages is the prototype of an action at law, in which the Seventh Amendment to the Constitution gives each party the right to trial by jury. *Atlas Roofing Co. v. Occupational Safety Commission,* 430 U.S. 442, 454 (1977) ("the Seventh Amendment [is] applicable to private damages suits in federal courts"); *Pernell v. Southall Realty,* 416 U.S. 363, 370 (1974) ("actions for damages to a person or property are actions at law triable to a jury"); *Curtis v. Loether,* 415

U.S. 189, 196 (1974) (damages are "the traditional form of relief offered in the courts of law"); *Ross v. Bernhard,* 396 U.S. 531, 533 (1970) ("The Seventh Amendment . . . entitled the parties to a jury trial in actions for damages to a person or property).

Since petitioner's action under § 36(b) is for damages, he is entitled to a jury trial.

E. In denying petitioner's demand for a jury trial, the court below held that petitioner's action was one for restitution, and therefore equitable; however, well before adoption of the Seventh Amendment, restitution was also a remedy at common law and thus triable to a jury

The court below characterized petitioner's cause of action under § 36(b) as one for restitution. Noting that restitution is part of a broader cause of action for money had and received, the Court of Appeals went on to hold that such an action sounds in equity and therefore a jury trial is not required by the Seventh Amendment. Op. at 54-5; 5a-6a. We submit that this holding is erroneous.

By the seventeenth century, the remedy of restitution was available both at common law and in equity. Although this form of relief was initially only available in equity, the common law judges eventually became jealous of the expanding power of the Court of Chancery. Conscious that the common law's inflexible and formalistic requirements in both pleading and proof afforded no remedy in many meritorious cases, these judges created the action of *indebitatus assumpsit* (also known as one of the "common counts" or an action for money had and received). *Stone v. White,* 301 U.S. 532, 534 (1937); *J.W. Carter Music Co. v. Bass,* 20 F.2d 390, 393 (S.D. Tex. 1927); Restatement of Restitution, Introductory Note, pp. 4-10 (1937); Prosser, *Handbook of the Law of Torts* (4th Ed.), § 94 at 627-31 (1971); Fleming James, Jr., Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 658-59 (1963).

It has been widely recognized that an action for money had and received is legal in form and is considered an action at law, although governed by equitable principles. *Gaines v. Miller,* 111 U.S. 395, 397-98 (1884); *Herrman v. Gleason,* 126 F.2d 936, 939-40 (6th Cir. 1942) ("This action, while legal in form, is equitable to the core"); *J.W. Carter Music Co. v. Bass, supra,* 20 F.2d at 393 ("Though an action at law, it is equitable in its nature, and is said to resemble a bill in equity, and to lie whenever a bill in equity would lie"); *Roberts v. Ely,* 113 N.Y. 128 (1889); *Byxbie v. Wood,* 24 N.Y. 607, 610-11 (1862); *Steinert v. Title Guarantee & Trust Co.,* 258 App. Div. 927, 16 N.Y.S.2d 749, 750 (2d Dept. 1939), *aff'd,* 283 N.Y. 636 (1940); 58 C.J.S., Money Received, § 1 at 906-07 (1948).

Thus, defenses which had originally been cognizable only in equity (e.g., fraud, duress) became available in a legal action for money had and received. *James, supra,* at 658. By the same token, the proof required of plaintiff eased dramatically—he had to show only that the "defendant had obtained possession of money which, in equity and good conscience, he ought not be allowed to retain." *Bankers Trust Co. v. Hale & Kilburn Corp.,* 84 F.2d 401, 404 (2d Cir. 1936); *Accord, Herrman v. Gleason, supra,* 126 F.2d at 939; *J.W. Carter Music Co. v. Bass, supra,* 20 F.2d at 393; 3 Blackstone Commentaries (12th Ed. 1794) at 161-62.

Assuming this were an action for restitution, the Court of Appeals erred in holding petitioner is not entitled to a jury trial.

As we have already noted, an action for money had and received, though governed by equitable principles, is universally recognized to be one at law. Accordingly, a jury trial has been historically available. Ames, The History of Assumpsit, 2 Harv. L.Rev. 53, 57 (1888) (". . . the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit* . . . ."); 3 Blackstone Commentaries at 157-58; 58 C.J.S. Money Received, § 32 at 946. For examples of assumpsit cases for money had and received which were tried to

a jury, *see Nash v. Towne,* 72 U.S. 689, 704 (1867); *Downey v. Hicks,* 14 How. 240, 246 (1852); *Brooks v. People's Bank,* 233 N.Y. 87, 93-94 (1922).

The fact that this action seeks recovery from a fiduciary does not change the case from one at law to one in equity. The courts have long recognized that an action for money had and received is an effective remedy for breaches of fiduciary duty. The general proposition was well stated almost a century ago in *Roberts v. Ely, supra,* 113 N.Y. at 131-32:

> *The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation.* The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity.
>
> * * * * *
>
> Nor is this form of action excluded, because in a general sense there is a relation of trust between the parties arising out of the transaction. There are many cases of trust cognizable only in a court of equity. The cases of express trusts of property are generally of this kind. The duty of the trustee to the cestui que trust, to perform the trust and to account according to its terms and conditions, is, as a general rule, enforcible only in an equitable action. The necessity of taking an account, the frequent complexity of details, the separate and varied interests often affected, and the necessity of molding the relief to suit the circumstances, render the procedure of courts of equity peculiarly suitable in the administration of formal trusts, and in many cases indispensable to the ascertainment and enforcement of the rights and obligations of the parties. *But the fact that money in the hands of one person is impressed with a trust in favor of another, or that the relation between them has a trust character, does not, ispo facto, exclude the jurisdiction of courts of law. The general rule that trusts are cognizable in equity and are enforcible only in an equitable action, is subject to many exceptions, "as, for instance, cases of*

> *bailments, and that larger class of cases where the action for money had and received for another's use is maintained ex aequo et bono."* (Story Eq. Jur., § 60; Comstock, J., *Lawrence v. Fox,* 20 N.Y. 278). (Emphasis added).

Corporate fiduciaries—directors and officers—are no exception to this principle. In *Gottfried v. Gottfried,* 269 App. Div. 413, 56 N.Y.S.2d 50, 59-60 (1st Dept. 1945), a derivative suit to recover, *inter alia,* monies wrongfully received by defendant-directors, the court reviewed the cases and declared:

> [T]he holdings are clear . . . that as to a corporate fiduciary who appropriates and as to all who receive the use or benefit of such corporate money, the gist of the action is for money had and received . . . .

Accord, Myer v. Myer, 271 App. Div. 465, 66 N.Y.S.2d 83, 93 (1st Dept. 1946), aff'd, 296 N.Y. 979 (1947).

Since an action for money had and received would give petitioner an adequate remedy at law, resort to equity is neither necessary, nor permitted. *Dairy Queen v. Wood, supra,* 369 U.S. at 478; *Whitehead v. Shattuck,* 138 U.S. 146, 151 (1891).

CONCLUSION

The petition for a writ of certiorari should be granted and the order below should be reversed.

Dated: New York, New York
February 12, 1981

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 254—September Term, 1980

(Petition for writ of mandamus
filed July 3, 1980 Decided October 9, 1980)

Docket No. 80-3034

In re

IRVING L. GARTENBERG,

Petitioner.

Before:

VAN GRAAFEILAND and NEWMAN, *Circuit Judges,*
and NEAHER, *District Judge.**

Petition for writ of mandamus directing District Judge Milton Pollack to grant petitioner a jury trial in an action brought in the United States District Court for the Southern District of New York under section 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b).

Petition denied.

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* The Honorable Edward R. Neaher, United States District Judge of the Eastern District of New York, sitting by designation.

POMERANTZ LEVY HAUDEK & BLOCK, New York, New York, *for Petitioner.*

VAN GRAAFEILAND, *Circuit Judge*:

Petitioner is a shareholder of Merrill Lynch Ready Assets Trust, a no-load, diversified, open-end investment company. In March 1980 he commenced a derivative action in the United States District Court for the Southern District of New York against Merrill Lynch Asset Management, Inc., the investment adviser of the Trust, and Merrill Lynch, Pierce, Fenner & Smith, Inc., the parent company of the adviser. The gravamen of his complaint was that the Trust adviser had been charging exorbitant fees and that this constituted a breach of its fiduciary duties under section 36(b) of the Investment Company Act of 1940 *as amended,* 15 U.S.C. § 80a-35(b). Petitioner demanded that the adviser and its parent company be required "to account to the Trust for all excessive advisory fees paid to the Adviser by the Trust up to the date of judgment and to repay such fees to the Trust."

Petitioner's demand for a jury trial was denied by Judge Pollack in an opinion reported at 487 F. Supp. 999. Petitioner now seeks mandamus directing the district judge to grant his demand. For reasons that follow, the petition is denied.

When Congress in 1967 set about to revise the Investment Company Act so as to eliminate excessive charges for advisory services, members differed as to how this best could be done. The original bills introduced in the Senate and the House provided that the propriety of charges should be determined by the test of "reasonableness". S. Rep. No. 91-184, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 4902. Influenced in part by industry opposition to the "reasonableness" standard, Congress shifted to the standard of "fiduciary duty" that is in the present Act.[1] This standard requires

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1 Section 36(b) provides in part that "the investment adviser of a registered investment company shall be deemed to have a fiduciary

no showing of tortious wrongdoing, but is concerned solely with fairness and equity, the traditional earmarks of fiduciary loyalty. 15 U.S.C. § 80a-35(b)(1).

However, although Congress created what it clearly recognized to be an equitable cause of action for breach of fiduciary duty, *see* S. Rep. No. 91-184, U.S. Code Cong. & Ad. News, *supra,* at 4911, it made no express provision in the statute for non-jury enforcement. Whether the jury-non-jury issue was "consistently ignored", as one writer suggested at the time,[2] or whether Congress felt that explicitness on this issue was either unnecessary or unwise, the fact remains that the revised statute is silent on this point. Petitioner contends that, because the statute does contain temporal and monetary limitations on the recovery of "damages",[3] any action under this statute must be one at law for damages, which the Seventh Amendment requires to be tried by a jury. We disagree.

The possibility that an action for damages may be brought under section 36(b) does not preclude all other remedies. An action for restitution may well fall within the meaning of the phrase "or other relief" contained in section 36(b)(3), 15 U.S.C. § 80a-35(b)(3). "A cause of action for restitution is a

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duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the securities holders thereof, to such investment adviser or any affiliated person of such investment adviser." 15 U.S.C. § 80a-35(b).

2 *See* Rottenberg, *Developing Limits on Compensation of Mutual Fund Advisors,* 7 Harv. J. Legis. 309, 353-54 (1970).

3 Section 36(b)(3) provides as follows:

> No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.

15 U.S.C. § 80a-35(b)(3).

type of the broader cause of action for money had and received, a remedy which is equitable in origin and function." *Atlantic Coast Line R.R. v. Florida,* 295 U.S. 301, 309 (1935). *See Baltimore & Ohio R.R. v. United States,* 279 U.S. 781, 785 (1929); *SEC v. Commonwealth Chemical Securities, Inc.,* 574 F.2d 90, 94-97 (2d Cir. 1978). Restitution is a remedy distinct from damages and requiring different proof. *Greenwood County v. Duke Power Co.,* 107 F.2d 484, 487 (4th Cir. 1939). In order to prevail, a plaintiff need show only "that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line R.R. v. Florida, supra,* 295 U.S. at 309.

Because an action under section 36(b) may be brought by either the SEC or a security holder, it is unlikely that Congress intended the action to be one for damages only. When the Commission sues, it does so in the public interest. Actions seeking disgorgement of profits are an effective and seemly method by which the Commission enforces the securities laws. *SEC v. Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1104 (2d Cir. 1972); *SEC v. Petrofunds, Inc.,* 420 F. Supp. 958 (S.D.N.Y. 1976). The pursuit of private actions for damages does not seem to be an appropriate role for this governmental body. *See* 4 Bromberg, *Securities Law,* § 10.2(2).

In *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287-88 (1940), Justice Murphy, writing for a unanimous Court, said:

> We think the Securities Act does not restrict purchasers seeking relief under its provisions to a money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him. Undoubtedly any suit to establish the civil liability imposed by the Act must ultimately seek recovery of the consideration paid less income received or damages if the claimant no longer owns the security. § 12(2); 15 U.S.C. § 77(1)(2). But § 12(2) states the legal consequences of

> conduct proscribed by the Act; it does not purport to state the form of action or procedure the claimant is to employ. . . . If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit, providing the bill contains the allegations the Act requires. That it does not authorize the bill in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment recovered under § 12(2).

To determine whether petitioner's action is in law or equity, we must look to the relief which he seeks, not the statute which gives him a right to sue. *Myzel v. Fields,* 386 F.2d 718, 741 (8th Cir. 1967), *cert. denied,* 390 U.S. 951 (1968); *Straley v. Universal Uranium & Milling Corp.,* 289 F.2d 370, 372-73 (9th Cir. 1961). We must examine the nature of the issue to be tried in the light of the historic legal and equitable practices applicable to issues of a similar nature. *Ross v. Bernhard,* 396 U.S. 531, 538 (1970).

The relationship between the Trust and its adviser was a fiduciary one in the traditional sense of the word. *Rosenfeld v. Black,* 445 F.2d 1337, 1342-44 (2d Cir. 1971), *cert. dismissed,* 409 U.S. 802 (1972). Section 36 merely established the fiduciary duties arising out of this relationship as a federal standard. *Burks v. Lasker,* 441 U.S. 471, 481-82 n.10 (1979). The issue in this case involves the equitable inquiry whether the Trust adviser violated its fiduciary obligations by charging an exorbitant fee. If it did, the excessive portion of the fee must be returned.[4] If the excessive portion was paid to an "affiliated person" of the adviser, equity will trace it and compel its repayment. *Halligan v. Standard & Poor's/Intercapital, Inc.,* 434 F. Supp. 1082 (E.D.N.Y. 1977).

"The remedial 1970 amendment of [section 36] added a subsection (b) which explicitly granted a private right of action

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4 Section 36(b) has a built-in one year statute of limitations. *See* footnote 3, *supra.*

to recover unreasonable compensation paid by a fund to its investment adviser." *Tannenbaum v. Zeller,* 552 F.2d 402, 417 (2d Cir.), *cert. denied,* 434 U.S. 934 (1977). This is the relief which petitioner seeks. He alleges no damage and seeks no damages. He is not entitled to a jury trial. *See Maldonado v. Flynn,* 477 F. Supp. 1007, 1009-11 (S.D.N.Y. 1979), *petition for writ of mandamus denied sub nom. In re William Maldonado,* No. 79-3072 (2d Cir., October 12, 1979).

Our decision is limited, of course, to the facts of this case. We leave for another day a determination as the right to a jury trial of a plaintiff making a bona fide claim for damages.

Petition for mandamus denied.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 CIV 3123(MP)

IRVING L. GARTENBERG,

Plaintiff,

—v.—

MERRILL LYNCH ASSET MANAGEMENT, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and MERRILL LYNCH READY ASSETS TRUST,

Defendants.

OPINION

APPEARANCES:

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MILTON POLLACK, *District Judge.*

MILTON POLLACK, *District Judge.*

This is a derivative action by a shareholder of a money-market mutual fund, brought pursuant to § 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b). Plaintiff has demanded a trial by jury as a matter of constitutional right. Plaintiff claims that the Fund's investment adviser, defendant Merrill Lynch Asset Management, Inc., breached the fiduciary duty it is deemed to have under § 36(b) by receiving excessive and unreasonable compensation under its contract with the Fund and consequently must respond in damages to the Fund. Plaintiff avers that it neither accepts nor attacks the contract purusant to which the adviser was paid the stipulated compensation.

Defendants have moved to strike plaintiff's demand for a jury trial on the grounds that: (1) § 36(b) provides for an equitable action to be administered on equitable standards and is not triable by jury, and (2) the relief sought herein for alleged breach of fiduciary duty (accounting, restitution) is obtainable only in an equitable action. Plaintiff, on the other hand, contends that the language and intrinsic substance of § 36(b) demonstrate that the claim here is analogous to one traditionally enforced at common law, and therefore, is triable by a jury.

The controlling question for determining whether the right to a jury trial exists in this case is whether "the action involves rights and remedies of the sort traditionally enforced at law,

rather than in an action in equity or admiralty." *Pernell v. Southall Realty,* 416 U.S. 363, 375 (1974). Where, as here, a plaintiff brings a derivative suit on behalf of a corporation, the right to a jury trial depends on whether the underlying claim is analogous to a claim enforcable at common law. *Ross v. Bernhard,* 396 U.S. 531, 538-39 (1970).[1]

For the reasons that appear hereafter, the motion to strike the jury demand herein will be granted.

I.

The Seventh Amendment was adopted in 1791 and the guarantee therein of a jury trial was linked with the common law of England as it existed in 1791. *Parsons v. Bedford,* 3 Pet. 433, 446-47 (1830); *Galloway v. United States,* 319 U.S. 372, 390-92 (1943). Under English practise, separate Courts administered cases at law and suits in equity. The former were triable to juries and the latter were heard at Bench trials by the chancellor.

After 1791, whenever Congress created a claim for relief, unless otherwise intended by Congress the American Courts assigned to the trial thereof, if possible, the incidents applicable to the closest historical analogue in pre-1791 cases. The statutory creation received the constitutional guarantee of a jury trial if the corresponding historical analogue was assertable at common law. Whether the claim was analogous to one administered at common law or in equity was not always readily perceptible or capable of application. *Whitehead v. Shattuck,* 138 U.S. 146, 151 (1891).

In 1938, law and equity in the federal courts were merged and one form of action to be known as "civil action" was

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1 The Seventh Amendment to the Constitution guarantees the right to jury trial only in "Suits at common law." U.S. Const. amend. VII. The Seventh Amendment has no application to cases in equity or admiralty. *See Ross v. Bernhard,* 396 U.S. 531, 533 (1970).

established by Rule 2 of the Federal Rules of Civil Procedure. However, it was not intended thereby to extend the Seventh Amendment guarantee of a jury trial to all civil cases; this remained available only in suits of common law character. Where a congressional statute created the right to be administered, the Rules did not modify the existence or absence of the right to a jury trial; and the Rules would not negate a demonstrable congressional purpose that a statutory claim should be administered at a Bench trial under equitable standards in an equitable action.[2] The Rules were adopted to govern the procedure in the federal distict courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, except as set forth in Rule 81 which is inapplicable here. Thus, the application of the Seventh Amendment to statutory causes of action turns on the nature of the action which Congress contemplated therefor.

The Congress unquestionably has the power to entrust enforcement of statutory rights to an equitable action to be administered on equitable standards free from the strictures of the Seventh Amendment. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) and *Katchen Landy,* 382 U.S. 323, 339 (1966), *Brotherhood of Railroad Trainmen v. Louisville and National Railroad Company,* 211 F. Supp. 308, 310 (N.D. Ala. 1962), *aff'd* 334 F.2d 79 (5th Cir. 1964), *cert. denied,* 383 U.S. 923 (1966). These cases are to be contrasted with a case for which Congress has contemplated enforcement of statutory rights in an ordinary civil action in the district courts, where there is no functional justification for denying the jury trial right. *Curtis v. Loether,* 415 U.S. 189 (1974).

In *Curtis,* the Supreme Court significantly noted that every claim for or award of monetary relief is not necessarily legal in nature. *Id.* pp. 196-97. The Court pointed out that Title VII of the Civil Rights Act, might not provide a jury trial in an action for reinstatement and back pay, since the monetary relief of

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2 See, generally for historical documentation, Jury Trials In Complex Litigation, 53 St. Johns Law Rev. 751 (1979).

back pay could be regarded as a form of restitution, a traditional equitable remedy. On the other hand, the monetary relief under Title VIII in *Curtis* was viewed as claimed in an ordinary civil action for damages.

The congressional power to entrust enforcement of newly created statutory rights free from the strictures of the Seventh Amendment is also illustrated where Congress creates new statutory "public rights". Congress

> . . . may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law". *Atlas Roofing Co. v. OSHA,* 430 U.S. 442, 455 (1977).

In a derivative stockholder's suit, the plaintiff asserts a claim belonging to his corporation. He is permitted, as an equitable concept, to enforce the corporate claim where the directors cannot or will not do so. The recovery in such a suit normally belongs to the corporation. Thus derivative suits sound in equity, but only to enable the stockholder to assert the corporation's claim. *Ross v. Bernhard, cit. supra,* rules that if such a claim, asserted directly by the corporation, would be cognizable in an action at common law, the aid of equitable principles to enable the stockholder to sue thereon nonetheless left the claim in the posture of one cognizable at common law and subject to jury trial; the right to jury trial was not dependent upon the vehicle enabling the plaintiff to sue. 398 U.S. at 538 & n.10, 542.

A claim pursuant to § 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b) may be asserted either by the Securities and Exchange Commission (SEC) or by a stockholder of the Fund on its behalf. Such a suit was of course not cognizable at common law, but this alone is not, as noted above, dispositive of the jury question. It still is necessary to examine the purpose and intent of Congress in respect to

whether the claim is to be administered as one at common law or in an equitable action that was not triable to a jury prior to 1791.

II.

Section 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b) provides in pertinent part:

> (b) For the purposes of this subsection, the investment adviser of a registered company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. With respect to any such action the following provisions shall apply:
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> (3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compen-

sation or payments received from such investment company, or the security holders thereof, by such recipient.

In support of his contention that the suit here involved was of a kind that could be brought at common law, the plaintiff analyzes the language, intrinsic substance and legislative history of § 36(b) as follows. Plaintiff points out that in the restriction on such litigation and the relief to be accorded, the word "damages" is mentioned four times. Section 36(b)(3). He argues that a straight "damage" claim is one at law and ordinarily triable to a jury under the Seventh Amendment, citing *Pernell v. Southall,* 416 U.S. 363, 370 (1974). He argues further that the intention was to create a claim at law because § 36(b)(3) limits the recover to actual damages thereby excluding punitive damages which are not recoverable. He puts the query, "If the claim is not one for damages then what is it for?" He responds to his question that it is not one for restitution because unjust enrichment or restitution is not co-extensive with and may be greater or less than actual damages and restitution therefore is not the contemplated recover under the statutory claim; that unjust enrichment as a measure of recovery is foreclosed by the statute because it prescribes that the recovery shall in no event exceed the amount of the compensation received.

Plaintiff's analysis does not survive a careful examination of the legislative history which shows that Congress went to great pains to emphasize that it was creating an equitable action to be administered on equitable standards. The plaintiff argues, however, that the legislative history of § 36(b) is inconclusive; that although the Senate Report announces that the right created is to be enforcible in an "equitable action", this description was used in deference to the age old understanding that all derivative stockholder suits were equitable actions because they were derivative. This argument is self-defeating; it amounts to no more than saying that the Senate contemplated that it was creating an equitable action.

Plaintiff contends that the ruling in *Ross v. Bernhard,* handed down on February 2, 1970, after the publication of the Senate Report of May 21, 1969, knocked out the underpinnings for the Senate's use of the term "equitable action". As we shall see, the difficulty with this argument is that the Senate and the House of Representatives considered the proposed legislation for many months after *Ross v. Bernhard* was announced and the Congress reiterated that the claim was to be judged on equitable standards in an equitable action, not an action on legal rules. In other words, having started out to create a right triable in an equitable action, Congress persisted in that purpose even after *Ross v. Bernhard.*

III.

1. *Legislative History*—Section 36(b) was added to the Investment Company Act in 1970. The Senate Report (Bankruptcy and Currency Committee) No. 91-184 was dated May 21, 1969[3] to accompany S. 2224. The House Report (Interstate and Foreign Commerce Committee) No. 91-1382 was dated August 7, 1970 to accompany H.R. 17333, the companion bill. The Conference Report No. 91-1631, was dated November 25, 1970 to accompany S. 2224. The legislation was considered in the Senate on May 26, 1969 and passed on November 30, 1970; and was considered in the House on September 23, 1970 and passed on December 1, 1970. The Senate bill was passed in lieu of the House bill.

The Senate Report reviewed the mechanism by which the fairness of advisory compensation under management contracts could be tested in court prior to the introduction of the new § 36(b) proposed to be enacted:

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3 S. 2224 introduced "A bill to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940 to define the equitable standards governing relationships between investment companies and their investment advisers and principle underwriters, and for other purposes".

> Under general rules of law, advisory contracts which are ratified by the shareholders, or in some States approved by a vote of the disinterested directors, may not be upset in the courts except upon a showing of "corporate waste." As one court put it, the fee must "Shock the conscience of the court." Such a rule may not be an improper one when the protections of arm's length bargaining are present. But in the mutual fund industry where these marketplace forces are not likely to operate as effectively, your committee has decided that the standard of "corporate waste" is unduly restrictive and recommends that it be changed. (p.5)
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> * * * * *

The Senate Report then stated the reason for addition of new § 36(b):

> Your committee believes that the investment adviser should be a fiduciary of the fund in such matters as the handling of the fund's assets and investments. Therefore, we have added a new section 36(b) to the Investment Company Act to specify that the adviser has a fiduciary duty with respect to compensation for services or other payments paid by the fund or its shareholders to the adviser or to affiliated persons of the adviser. (p.6)
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> This section is not intended to authorize a court to substitute its business judgment for that of the mutual fund's board of directors in the area of management fees. It does, however, authorize the court to determine whether the investment adviser has committed a breach of fiduciary duty in determining or receiving the fee. (p.6)

In its "Explanation and Analysis of the Bill," the Senate Report stated that:

> In the event that court action is brought to enforce this fiduciary duty of the investment adviser as to compensation or payments received by him, it is intended that the court look at all the facts in connection with the determination and receipt of such compensation, including all

services rendered to the fund of its shareholders and all compensation and payments received, in order to reach a decision as to whether the adviser has properly acted as a fiduciary in relation to such compensation. (p.15)

* * * * *

Thus, upon a challenge in court to compensation or payments, the ultimate test, even if the compensation or payments are approved by the directors and stockholders, will not be whether it involves a "waste" of corporate assets but will be whether the investment adviser has fulfilled his fiduciary duty to the mutual fund shareholders in determining the fee.

Section 36(b) authorizes the Commission and also a shareholder acting on behalf of the fund to institute *an equitable action* involving a claim of breach of fiduciary duty. The section makes it explicit that the Commission or any other plaintiff has the burden of proving to the satisfaction of the court that the defendant has committed a breach of fiduciary duty. (Emphasis supplied) (pp. 15-16)[4]

The companion House bill (H.R. 17333) was introduced on April 29, 1970 and was reported on August 7, 1970. Again, as in the Senate Report, the new action created by § 36(b) was described in the House Report as follows:

Section 36(b) authorized the Commission and also a shareholder acting on behalf of the fund to institute an *equitable action* involving a claim of breach of fiduciary duty. (Emphasis supplied) (p. 38)

* * * * *

Although section 36(b) provides for an *equitable action* for breach of fiduciary duty as does section 36(a), the fact that subsection (b) specifically provides for a private right

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4 S. Rep. No. 91-184, 91st Cong., 1st Sess. (1969). *reprinted in* [1970] U.S. Code Cong. & Admin. News, 91st Cong., 1st Sess. at 4910-11.

of action should not be read by implication to affect subsection (a). (Emphasis supplied) (p. 38)[5]

Finally, the Conference Report dated November 25, 1970, makes abundantly clear that Congress intended to prescribe equitable standards and an equitable action for § 36(b). The report reads (in part):

> The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2224) to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940 to define *the equitable standards* governing relationships between investment companies and their investment advisers and principal underwriters, and for other purposes, submit the following statement in explanation of the effect of the *action agreed* upon by the conferees and recommended in the accompanying conference report: (Emphasis supplied) (p. 4943)
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> * * * * *
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> The conference agreement *follows the Senate version* by requiring in an *action* under section 36(b) that the plaintiff be a security holder of the investment company and that he bears the burden of proof. (p. 4947)[6] (Emphasis supplied).

The reference to "equitable standards" made chronologically after the decision in *Ross v. Bernhard* completely refutes plaintiff's contention that Congress merely considered the action equitable because derivative. The Supreme Court has recognized that Congress is aware of the significance of the terms "legal" and "equitable" with respect to the right to a jury trial. *Lorillard v. Pons,* 434 U.S. 575, 583, 585 (1978). There can be no question about Congress' intent here.

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5 H.R. Rep. No. 91-1382, 91st Cong. 2d Sess. (1970). Another hurdle which confronts plaintiff is that both Houses of Congress treat the Commission's action and the stockholders' action in *pari materia.* It is well settled that there is no right to a jury trial in actions brought by the Commission.

6 H.R. Conf. Rep. No. 91-1631, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. Code Cong. & Admin. News 4943-4948.

2. *Breaches of fiduciary duty involve equitable rights*—A functional analysis of the statute makes it clear that actions under it must be considered equitable. Historically, actions based on breaches of fiduciary duty have sounded in equity. *Atwood v. Pacific Maritime Ass'n,* 432 F. Supp. 491, 497 (D. Or. 1977) ("[A]n action for breach of duty of fair representation is analogous to a suit in equity for breach of fiduciary duty, as to which no constitutional right to trial by jury attaches."); Restatement of Restitution, Introductory Note at 9 (1937) ("[E]quity still retains jurisdiction over nearly all situations involving a breach of fiduciary duty."); *Note,* 65 Harvard Law Review 453, 462, 466 (1952) ("It would seem better . . . for fiduciary relationships to be always adjusted by the court, as they usually were before merger.") *Cf. Schine v. Schine,* 367 F.2d 685, 687 (2d Cir. 1966) ("Plaintiffs' fourth claim, for an accounting based on defendants' alleged breaches of their fiduciary duty as officers, directors, and majority stockholders, would have been cognizable in equity before the merger of law and equity.").

Plaintiff maintains that this fact is without significance, however, because in a number of cases (notably, *Ross v. Bernhard*) courts have held that where an action for breach of fiduciary duty is predicted upon underlying conduct, such as negligence, which is actionable at common law, a right to trial by jury exists. Plaintiff's reliance is misplaced, however, insofar as those cases merely recognize that where both legal and equitable claims are present, the right to a jury trial is preserved.

Thus, in *Ross v. Bernhard,* the Court implicitly acknowledged that, standing alone, an allegation of breach of fiduciary duty would sound in equity:

> There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negli-

> gence. Under these circumstances, it is unnecessary to decide whether the corporation's other claims are also properly triable to a jury. (pp. 542-43)

The only claim in this case is for breach of fiduciary duty by receiving contractual compensation that, on equitable standards, is excessive for investment advice and the relief demanded is an accounting to the Trust and monetary repayment. There is no underlying "legal" claim for ordinary breach of contract or negligence, or any other.

3. *The remedies involved are equitable in nature*—In the complaint, plaintiff prays for judgment

> 1. Requiring the Adviser and Merrill Lynch to account to the Trust for all excessive advisory fees paid to the Adviser by the Trust and to repay such fees to the Trust . . .

Plaintiff does not dispute that the prayer for an accounting is a request for equitable relief, but argues that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleading," *Dairy Queen v. Wood,* 369 U.S. 469, 477-79 (1962).

Rather, plaintiff argues, by the terms of the statute, the only remedy available thereunder is repayment of "damages", which, he believes, necessarily invokes a legal remedy. Defendants, on the other hand, argue that, notwithstanding that the repayment is termed "damages", the remedy provided for under § 36(b) and being sought in this case is, in substance, restitution, which is an equitable remedy.

Far from being conclusive, the presence of the word "damages" merely launches the inquiry into the legislative intent behind the wording of § 36(b). While it is true that § 36(b) speaks of an "award of damages", it seems likely from the context that Congress was using "damages" merely as a shorthand for "recovery of money", not as a legal term of art. Since, as noted above, not all claims for monetary relief are

legal in nature, the use of the term "damages" is not persuasive in this instance. In particular, given the repeated statement in the legislative history that actions under § 36(b) are equitable, to be administered on equitable standards, it would seem impossible to conclude from the use of the word "damages" that Congress thereby provided for a trial by jury.

Moreover, regardless of the nomenclature used in the statute or the prayer for relief, plaintiff states in his brief that "repayment of the excessive fees would wipe out [i.e., are equivalent to] the damages to the fund in this case." In effect, this concedes that the remedy sought by plaintiff is in substance and reality restitution.

Plaintiff argues, however, that restitution is not an exclusively equitable remedy, even assuming that it is the remedy being sought in this case and provided for by the statute. While this may be true as an abstract proposition, it has no bearing on this case, because, as defendants point out, in circumstances such as those presented here, restitution has been held to be an equitable remedy.

Thus, in *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978), where the SEC sought disgorgement of profits on the basis of alleged violations of the federal securities laws, the Second Circuit stated:

> [N]ot all money claims are triable to a jury. A historic equitable remedy was the grant of restitution "by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." [Cites omitted.] And "[w]hen restitution is sought in the form and in the situations allowed in equity prior to the rules or authorized by valid statutes there is no right to jury trial." 5 *Moore, supra,* ¶ 38.24 at 190.6.

Plaintiff seeks to distinguish this case on the ground that it involved an action brought by the SEC. This contention, however, was recently addressed and discarded by Judge Weinfeld in *Maldonado v. Flynn,* 477 F. Supp. 1007 (S.D.N.Y. 1979), in which he stated:

> The fact that the action in that case [*SEC v. Commonwealth Chemical Securities, Inc., supra*] was an SEC enforcement action was considered by the Court of Appeals but was not a factor essential to its holding which turned simply on recognizing the relief sought as restitutionary in nature and on the finding that restitution was an equitable remedy. . . . 477 F. Supp. at 1011 n.14.

In *Maldonado,* Judge Weinfeld struck a plaintiff's demand for a jury trial in a stockholder's derivative suit alleging violations of the securities laws. One of the claims was for repayment to the corporation of compensation paid to directors. In language applicable to the case at hand, Judge Weinfeld said:

> Each claim, whether for printing and mailing expenses or recapture of compensation and expenses paid to directors, basically seeks restitution for the benefit of the corporation. Despite plaintiff's reiterated assertion that the claims are to recover "money damages," they are essentially equitable in nature. The fact that recovery of "money damages" is sought does not change the basic nature of the claims.
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> * * * * *
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> In the event plaintiff prevails, it is clear that to the extent it is established that the corporation was damaged, restitution would be the remedy. Accordingly, defendants' motion to strike the jury demand in plaintiff's amended complaint is granted.

Id. at 1011.

The Fifth Circuit, in a patent infringement suit has also rejected the notion that any and all actions for "damages" are triable to a jury.

> . . . we reject a view that the trio of Beacon Theatres, Dairy Queen and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by jury. *Swofford v. B & W, Incorporated,* 336

F.2d 406, 414 (5th Cir. 1964), *cert. denied,* 397 U.S. 962 (1965).

Defendants also point out that Judge Henry J. Friendly, when testifying before a House subcommittee considering amending the statute to apply a "reasonableness" standard to the amount of advisory fees paid by a mutual fund, stated, "[A]ctions to recover unreasonable fees are equitable in nature, [and] would be tried to judges and not to juries." Insofar as the particular bill under consideration was not adopted plaintiff may be right that this is not persuasive legislative history (though defendants have argued persuasively that it is); however, it nonetheless represents the authorative opinion of an eminent jurist that an action much like the one at hand is equitable in nature, and is worthy of consideration as such. See, Statement of Judge Henry J. Friendly, Hearings before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, November 12-December 11, 1969, Serial No. 91-33, at 792.

The plaintiff's counsel asserted at the argument of the motion that plaintiff neither attacks nor accepts the contrast between the Fund and its adviser. Seemingly this places the case beyond the pale of an action at common law. A contract exists and the adviser is entitled at law to its enforcement as written. The common law did not undertake to revise contractual arrangements. There is here no claim of fraud, duress, illegality or nonexistence of the contract which, if established, could strike it down, and permit a *quantum meruit* valuation of the services.[7]

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7 Plaintiff cited *Simler v. Conner,* 372 U.S. 221 (1963) as applicable nonetheless; however, that authority is wholly inapposite since the contract being administered was one for *reasonable* fees under a contingent fee retainer stipulating that reasonableness may be set in a court trial. Respondent relied on a *subsequent* contract specifying 50% of the recovery, under certain circumstances, as the amount of the fee. Petitioner countered that the latter contract was the product of fraud and overreaching by the lawyer.

In sum, it appears that in the present case, plaintiff is essentially seeking restitution for alleged breach of a fiduciary duty, which is an action that sounds in equity and was created expressly as an equitable claim and not as one triable under common law principles. Accordingly, plaintiff's demand for a jury trial should be and hereby is stricken.

SO ORDERED.

March 18, 1980

Milton Pollack

U.S. District Judge

Order of the Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of November, one thousand nine hundred and eighty.

Docket No. 80-3034

In Re:

IRVING L. GARTENBERG,

Petitioner.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioner, Irving L. Gartenberg,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO

A. Daniel Fusaro
Clerk

Plaintiff's Amended and Supplemental Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 3123 (MP)

IRVING L. GARTENBERG,

Plaintiff,

—against—

MERRILL LYNCH ASSET MANAGEMENT, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and MERRILL LYNCH READY ASSETS TRUST,

Defendants.

Plaintiff Demands Trial by Jury

Plaintiff, by his attorneys, alleges the following on information and belief, except ¶ 2, which is alleged upon knowledge:

1. This cause of action arises under the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-1 *et seq.* (the "Act"), and in particular, under § 36(b) thereof, 15 U.S.C. § 80a-35(b). Jurisdiction is based upon § 36(b) and § 44 of the Act.

2. Plaintiff is a sharefolder of Merrill Lynch Ready Assets Trust (the "Trust"). Plaintiff brings this action on behalf of the Trust.

3. The Trust is an unincorporated business trust organized under the laws of Massachusetts. It is a no-load diversified, open-end investment company. It is commonly referred to as a money market fund.

4. The Trust's investment objective is to achieve the highest possible current income consistent with the preservation of capital and the maintaining of liquidity by investing in the short-term money market. Thus, the Trust invests in short-term United States Government securities, Government agency securities, bank certificates of deposit and bankers' acceptances, short-term corporate debt securities, such as commercial paper and variable amount master demand notes, and repurchase and reverse repurchase agreements.

5. Defendant Merrill Lynch Asset Management, Inc. (the "Adviser") is the investment adviser to the Trust.

6. Defendant Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") is the parent of the Adviser. Merrill Lynch owns, and has at all relevant times owned, 100% of the stock of the Adviser.

7. As of December 31, 1978, the Trust's net assets were $1,635,273,693. This was up from $428,048,572 as of December 31, 1977. The Trust was organized on January 18, 1975 and commenced operations on February 19, 1975.

7A. As of December 31, 1979, the Trust's net assets were $8,145,145,514.

8. For the year ended December 31, 1978, the total advisory fees paid to the Adviser aggregated $4,361,393.

8A. For the year ended December 31, 1979, the total advisory fees paid to the Adviser aggregated $15,704,358.

9-9A. At the present time, the Trust's net assets are believed to approximate $10.4 billion and the Adviser is receiving advisory fees from the Trust at the rate of over $30 million per year.

10. The Adviser is now receiving advisory fees from the Trust based upon a percentage of the Trust's total net assets at the following annual rates:

ADVISORY FEE

Portion of average daily value of net assets:

Not exceeding $500 million	0.50%
In excess of $500 million but not exceeding $750 million.	0.425%
In excess of $750 million but not exceeding $1 billion.	0.375%
In excess of $1 billion but not exceeding $1.5 billion.	0.35%
In excess of $1.5 billion but not exceeding $2 billion.	0.325%
In excess of $2 billion but not exceeding $2.5 billion.	0.30%
In excess of $2.5 billion.	0.275%

11. The Adviser and a subsidiary of the Adviser act as investment advisers for a number of other funds, three of which are also money market funds.

12. Unlike most other investment companies, the management of a money market fund, such as the Trust, does not require the detailed analysis of industries nor of complex industrial companies and the concomitant retention of a large staff of highly paid securities analysts. Indeed, although the Trust had assets of over $1.6 billion as of December 31, 1978, those assets were invested in relatively few securities, to wit, certificates of deposit in 34 banks, commercial paper in six corporations, one corporate bond, and six short-term Government obligations.

13. Moreover, it is the Trust's policy to be as fully invested as possible. As of December 31, 1978, the Trust's assets included cash of only $2,243,791. The vast majority of the Trust assets (over $1.4 billion as of December 31, 1978), were invested in certificates of deposit, so that the principal investment decisions are which certificates of deposit to buy and sell.

These decisions are confined to domestic banks (or savings and loan associations) having assets of at least one billion dollars.

13A. As of December 31, 1979, the Trust's assets included cash of only $293,772. The vast majority of the Trust's assets, 59.1%, were invested in certificates of deposit; 13.3% were invest in United States Government and Agency discount notes; 0.6% were invested in United States Government and Agency obligations; 14.9% were invested in bankers' acceptances; 8.4% were invested in commercial paper and 4.0% were invested in repurchase agreements.

14. The Trust's investment decisions can be made by a single person or, at most, a handful of persons. They are not worth over $4 million per year, let alone $15 million per year.

15. The expenses of the Adviser in acting as investment adviser to the Trust are negligible. As a consequence, the profit which it has made from the huge fees paid to it by the Trust are exorbitant.

16. Although the purpose of the Trust is to maximize current income, the advisory fees paid to the Adviser operate to reduce income. In the year ended December 31, 1978, the advisory fee consumed 5.75% of the Trust's investment income and constituted 70% of all Trust expenses.

17. The advisory fees paid by the Trust to the Adviser are exorbitant, unreasonable, excessive, and completely disproportionate to the services rendered in return therefor.

18. Pursuant to § 36(b) of the Act, the Adviser has a fiduciary duty with respect to the receipt of compensation from the Trust.

19. By virtue of the foregoing, the Adviser has breached its fiduciary duty to the Trust, and is liable to the Trust therefor.

20. Pursuant to § 48 of the Act, a controlling person is liable for the unlawful acts which it has caused to be done by any other person. Merrill Lynch is a controlling person of the Adviser; it is liable for the excessive compensation which it has caused the Adviser to exact from the Trust.

WHEREFORE, plaintiff prays for judgment:

1. Requiring the Adviser and Merrill Lynch to account to the Trust for all excessive advisory fees paid to the Adviser by the Trust up to the date of judgment and to repay such fees to the Trust;

2. Allowing plaintiff the cost and expenses of this action, including reasonable counsel fees; and

3. Granting plaintiff such other relief as may be just.

POMERANTZ LEVY HAUDEK & BLOCK

By: A. L. POMERANTZ

A Member of the Firm
Attorneys for Plaintiff
295 Madison Avenue
New York, New York 10017
(212) 532-4800

Dated: New York, New York
March 10th, 1980

VERIFICATION

STATE OF NEW YORK,

COUNTY OF NEW YORK, *ss.*:

IRVING L. GARTENBERG, being duly sworn, deposes and says: I am the plaintiff in the within action; I have read the foregoing Amended and Supplemental Complaint and know the contents thereof; the same is true to my knowledge except as to matters stated to be on information and belief, and as to those matters, I believe them to be true.

I. L. GARTENBERG

Irving L. Gartenberg

Sworn to before me this
10th day of March, 1980

FANNY HANDEL

Notary Public

FANNY HANDEL
Notary Public, State of New York
NO. 41-4621126
Qualified in Queens County
Commission Expires March 30, 1980

Section 36(b) of the Investment Company Act of 1940, as amended; 15 USC § 80a-35(b):

Compensation or payments as basis of fiduciary duty; civil actions by Commission or security holder; burden of proof; judicial consideration of director or shareholder approval; persons liable; extent of liability; exempted transactions; jurisdiction; finding restriction

(b) For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. With respect to any such action the following provisions shall apply:

(1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.

(2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given

such consideration by the court as is deemed appropriate under all the circumstance.

(3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.

(4) This subsection shall not apply to compensation or payments made in connection with transactions subject to section 80a-17 of this title, or rules, regulations, or orders thereunder, or to sales loans for the acquisition of any security issued by a registered investment company.

(5) Any action pursuant to this subsection may be brought only in an appropriate district court of the United States.

(6) No finding by a court with respect to a breach of fiduciary duty under this subsection shall be made a basis (A) for a finding of a violation of this subchapter for the purposes of sections 80a-9 and 80a-48 of this title, section 78*o* of this title, or section 80b-3 of this title, or (B) for an injunction to prohibit any person from serving in any of the capacities enumerated in subsection (a) of this section.

Aug. 22, 1940, c. 686, Title I, § 36, 54 Stat. 841; Dec. 14, 1970, Pub. L. 91-547, § 20, 84 Stat. 1428.